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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1500

WILLIAM CROMER KNOX AND CHARLES R. WILSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is at 458 F. 2d 612.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1972, and petitions for rehearing and for rehearing *en banc* were denied on April 19, 1972 (Pet. App. B). The petition for a writ of certiorari was filed on May 17, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether agents of the Texas Railroad Commission, acting pursuant to a Commission Rule authorizing representatives of the Commission to go upon any oil-producing lease for inspection purposes and to make tests necessary to conservation regulation on any well at any time, properly entered onto a lease without a search warrant for the purpose of conducting production potential tests of the wells.

2. Whether the removal of oil samples from the lease, with the permission of a Commission representative, by an employee of a private company whom the owner had authorized to do anything he cared to on the lease, violated the owner's Fourth Amendment rights.

3. Whether evidence obtained by a private trespass in which no state or federal agent had participated was admissible.

4. Whether the court of appeals properly held that the admission of certain evidence, involving no constitutional issue, had been harmless error.

5. Whether the Federal Business Records Act (28 U.S.C. 1732) unconstitutionally denies to the accused in a criminal case his right to be confronted by the witnesses against him.

6. Whether the evidence is sufficient to support petitioners' mail fraud convictions.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of using the mails to defraud and of conspiring so to do, in violation of 18 U.S.C. 1341 and

371 (R. 7–19, 71–73).[1] On June 9, 1971, each was sentenced to three years' imprisonment (R. 83–86).[2] The court of appeals affirmed (Pet. App. A).

1. Petitioner Wilson is the owner of a royalty and the working interest in two oil wells located upon land which he owns in Garza County, Texas. The oil from the wells was sold to Pan American Petroleum Company ("Pan American") and was transported from the lease by a pipeline gathering system owned and operated by Service Pipeline Company ("Service Pipeline").[3] Petitioner Knox was employed by Service Pipeline as a gauger, whose duty it was to determine how much oil entered the pipeline system from tanks on the lease in which the oil from the wells was stored between runs. Following completion of a run, Knox would fill out run tickets, showing how much oil had flowed into the pipeline, and mail them to Pan American. On the basis of these tickets Pan American would mail Wilson a check for the oil it had supposedly received. The scheme charged by the

[1] "R." refers to the appendix record, in two consecutively paginated volumes. "Supp. R." refers to the one-volume supplemental appendix. Copies of these documents are being lodged herewith.

[2] Petitioner Wilson was convicted on all counts of the ten-count indictment. Petitioner Knox, who was named in all of the counts except substantive counts 4, 6, and 8, was convicted on each of the counts in which he was named. Each petitioner was sentenced to three years' imprisonment on each count, to run concurrently.

[3] Both Pan American and Service Pipeline (which were known at the time of trial as Amoco Production Company and Amoco Pipeline Company, respectively) are wholly owned subsidiaries of Standard Oil Company of Indiana (R. 99–100, 230, 276, 343–344, 366; Supp. R. 4–5).

indictment was one to defraud Pan American through falsification by Knox of the reported quantities of oil released in the runs (Pet. App. A 38; R. 7–19, 101–113, 248, 281–284, 691–692).

During the five-year period, 1964 to 1969, involved in the alleged scheme, Wilson received a total of $97,885 in payment for oil purportedly produced from the lease. According to the run tickets, the amount of oil delivered had increased each year during the period. Based upon oil samples from the lease, the condition of the Stentz and check valves (valves through which the oil was required to flow as it passed from the tanks to the pipelines), and production figures for comparable wells, there was expert testimony that no such increased production had occurred. This evidence included testimony that no oil had flowed through the Stentz valve on the Wilson lease (see *infra*) for more than a year prior to the last run reported in the tickets. The expert witness, Ray Amstutz, testified that the interior of the Stentz valve was dry, rusty, and free of any visible oil, whereas the like valves from adjacent and neighboring leases, which Amstutz had examined following oil runs that had occurred from three days to more than 13 months previously, all showed clearly visible oil traces (Pet. App. A 38; R. 285–288, 479–493, 873).

2. Petitioners' principal contentions relate to the manner in which the government acquired various items of evidence. A chronology of their acquisition may therefore be helpful.

(a) *Rate of tank filling* (*see Point 3, infra*).

In the fall of 1968 after learning that the oil runs from the Wilson lease were reported to be considerably higher than those from other leases in the area, Arthur Pansze, a Pan American investigator, undertook to try to determine what Wilson's wells were producing (R. 343–344, 380–381). Pansze entered onto the lease to see if he could gauge the tanks without petitioners' knowledge, but found that the hatches on two of the four tanks were locked (R. 382). He noted the numbers of the locks, had keys made for them, and in this way was able to gauge the tanks on the nights of October 24 and 31, 1968 (R. 382–383, 389–390). He found that the fluid contents of the tanks had increased by 11.1 barrels over the seven-day period, during which no oil runs to the pipelines had occurred. The amount of the increase was admitted in evidence (R. 389–390, 395, 737). No government official, state or federal, had had any part in these activities.

(b) *Production potential tests* (*see Point 1, infra*).

After Pansze's tests Service Pipeline complained to the Texas Railroad Commission, the state's regulating authority for the oil and gas industry, that it believed that there were irregularities connected with the Wilson lease and that the lease was incapable of producing the amount of oil that was claimed for it (R. 115, 135, 174, 345). Production potential tests were ordered by the Commission and were conducted by it on December 1, 2, and 3, 1969 (R. 135, 172–173). The tests, which were not requested by Service Pipeline, were observed by Service Pipeline and Pan American employees, but no employee of either com-

pany entered onto the lease during them (R. 347–349). The tests, which revealed that the wells together produced 1.29 barrels of oil over the 51-hour period they were in progress (R. 173), were introduced in evidence.

After these tests the Commission issued a severance order prohibiting Wilson from making further deliveries of oil to the pipelines, for the stated reason that he had failed to file proper production reports (R. 139–141).

(c) *Oil samples* (*see Point 2, infra*).

On January 13 and 14, 1970, pursuant to an order of the Director of Field Operations of the Commission, and under the supervision of a Commission official, excavations were conducted on the lease to determine whether undisclosed pipelines led into or out of the premises (R. 115, 177–179, 202, 372). Because the Commission lacked the equipment and personnel for such work, Service Pipeline employees and equipment were used in the project (R. 178, 207). No hidden pipelines were found (R. 178–179). During the digging, in a conversation initiated by Wilson, Wilson told Robert Huerta, a security agent of American Oil Company (an affiliate of Service Pipeline and Pan American), after Huerta had identified himself at Wilson's request, that he could do anything he cared to on the lease (R. 398, 400). Huerta thereafter took oil samples from the tanks and from various locations in the pipeline (R. 400–402). Before doing so, Huerta sought and obtained the permission of Will Edd Parker, the Commission official in charge of the digging project (R. 183, 400). Besides taking the oil

samples, Huerta removed or directed the removal of the Stentz and check valves from the pipeline system (R. 412, 498–499). The valves were the property of Service Pipeline (R. 412).[4] Evidence of tests performed on the oil samples was admitted at petitioners' trial (R. 351–352, 366–367, 402–403, 412–413, 498–506).

No federal authority had had anything to do with any of the foregoing transactions.

ARGUMENT

1. Petitioners contend that the results of the Railroad Commission's production potential tests were inadmissible because the Commission did not obtain a search warrant authorizing it to enter upon the lease (Pet. 19–22). However, Rule Two of the Commission, which was issued pursuant to the rule making authority granted that body by the Texas legislature and has the force and effect of a statute (*L&G Oil Company* v. *Railroad Commission,* 368 S. W. 2d 187, 191, 193 (Tex.); *Trapp* v. *Shell Oil Co.,* 145 Tex. 323, 346, 198 S. W. 2d 424, 439), authorizes agents of the Commission to go upon any lease or property operated or controlled by an oil producer, to inspect any and all leases, properties, and wells, and to make tests necessary to conservation regulation on any well at any time (see Pet. App. A 41 n. 4). The

[4] In addition to owning the valves, Service Pipeline had a contract easement with Wilson's predecessor in interest, binding on Wilson, giving it the right to enter onto the lease at any time in order to "construct, maintain, inspect, operate, protect, repair, replace, * * * or remove" its pipeline (R. 35; Supp. R. 26). The valves were part of the pipeline system. Petitioners make no claim that either valve was improperly seized.

entry and testing involved here came within the scope of this authority. Service Pipeline and Pan American were properly concerned, as the court of appeals noted (Pet. App. A 41), about the ever increasing production figures from the lease. This was also a matter of proper concern to the Commission, even from the strict viewpoint of its conservation authority. Hence when complaint was made to the Commission, it properly undertook to investigate. In light of the specific authority granted it by the Rule, the procuring of a search warrant was unnecessary. Cf. *United States* v. *Biswell*, No. 71–81, O.T., 1971, decided May 15, 1972.[5]

2. Nor is there merit to petitioners' claim that the oil samples were improperly removed from the lease (Pet. 22–24). Wilson told him, according to Huerta (the private employee of American Oil Company who took the samples), that he could do anything he cared to on the lease. Wilson's statement was made after Huerta had identified himself, at Wilson's request, in a conversation which Wilson had initiated. The court of appeals properly concluded in these circumstances that Huerta had acted with Wilson's consent. There is no basis for an inference that Wilson's consent was given either as the result of a mistaken impression on Wilson's part of Huerta's identity or

[5] Moreover, unlike such cases as *Elkins* v. *United States*, 364 U.S. 206, *Camara* v. *Municipal Court*, 387 U.S. 523, and the other cases cited at Pet. 20, each of which involved search of a dwelling or ordinary commercial establishment, the entry here was into relatively open territory, a lease in an oil field. Cf. *Hester* v. *United States*, 265 U.S. 57.

pursuant to a show of authority or implied demand by Huerta.[6] Huerta's testimony was not disputed at the trial and is not challenged here (Pet. 11, 23).

It is immaterial that before taking the samples Huerta also secured the permission of Parker, the Commission official on the scene, who was supervising the excavation operation. The official was properly on the lease in connection with the Commission's ongoing investigation and it was only natural for Huerta to have felt that he should have his permission as well as Wilson's for what he did.

The district court, as petitioners note, in ruling on the pretrial suppression motion, treated the taking of the samples (presumably because of Parker's role in the matter) as "at least in part" Commission—and hence Texas—action and held that the action had been proper in the circumstances (Pet. 9; Supp. R. 26–27). The court of appeals had no occasion to consider the propriety of the taking viewed as an unconsented-to state action because it treated the taking as the private act of Huerta, to which Wilson had in any case consented (Pet. App. A40, 41).

Even if it be assumed, moreover, *arguendo,* that the taking of the samples involved an impropriety attributable to the Commission's representative by reason of his having consented thereto, reversal would

[6] Hence *Bumper* v. *North Carolina*, 391 U.S. 543, relied on by petitioners, is inapposite. There the "consent" relied on by the prosecuting authorities, by a householder to a search of her home following announcement by the officers that they had a search warrant, was, as the Court noted, "no more than acquiescence to a claim of lawful authority" (at 549).

not be required. The only evidence based on the samples was the expert testimony that the oil in them was stale. The sole significance of the evidence was that it tended to show that no oil, or very little, had flowed from the tanks into the pipeline gathering system during the last six months to a year of the pertinent period (cf. Pet. 7–8). That fact, however, was established—wholly independently of the age of the oil—by the expert testimony based on the condition of the Stentz valve. The valve, as noted previously, was Service Pipeline's property, not Wilson's, and no impropriety was involved in its removal. Petitioners, indeed, do not contend otherwise here. Hence even if the testimony based on the oil samples was inadmissible, the error was harmless beyond a reasonable doubt. Cf. *Chapman* v. *California,* 386 U.S. 18, 21–24.

3. Petitioners concede that under *Burdeau* v. *McDowell,* 256 U.S. 465, the evidence which Pansze, Pan American's investigator, obtained through a trespass to which no government agent was a party (*supra,* p. 5) was admissible, but urge that the decision no longer has vitality and should be reexamined (Pet. 32–35). However, the rationale of *Burdeau*—that the Fourth Amendment and its implementing exclusionary rule protect only against official invasions of privacy—has remained unimpaired by the more recent decisions of this Court and the decision has been consistently followed by the courts of appeals. See, *e.g., United States* v. *Winbush,* 428 F. 2d 357, 358–359 (C.A. 6), certiorari denied, 400 U.S. 918; *Watson* v. *United States,* 391 F. 2d 927, 928 (C.A. 5), certiorari denied,

393 U.S. 985; *United States* v. *McGuire*, 381 F. 2d 306, 312–313 (C.A. 2), certiorari denied, 389 U.S. 1053; *Barnes* v. *United States*, 373 F. 2d 517, 518 (C.A. 5); *United States* v. *Goldberg*, 330 F. 2d 30, 35 (C.A. 3), certiorari denied, 377 U.S. 953; cf. *People* v. *Horman*, 22 N.Y. 2d 378, 239 N. E. 2d 625, certiorari denied, 393 U.S. 1057. There is no sound reason why prosecuting authorities should not be able to use probative evidence obtained without governmental wrongdoing.[7]

4. The government's expert witness estimated the average age of the oil in the Wilson tanks at six months, based on a comparison of the samples taken therefrom with a 55-day-old sample of the oil from a tank on an adjacent property known as the Hudman lease (R. 464–469). Because the person who had taken the sample from the Hudman tank was not identified by the government and the expert had simply used the label on the sample to identify it as Hudman oil, the court of appeals held that the admission of the estimate had been error, but that the error had been harmless because it was the age of the Wilson oil,

[7] Even assuming, moreover, *arguendo*, that the challenged evidence was improperly received, the error, here again, was harmless. The substance of the evidence was that the amount of oil in the tanks had increased by only 11.1 barrels within a seven-day period in late 1968—and inferentially that that had been the amount produced by the wells during the period. However, the only significance of the statistic was that it tended to show that little if any oil had flowed into the pipelines from the tanks during the last twelve months or so of the indictment period—a fact independently shown by the expert testimony based on the condition of the Stentz valve (*supra*, p. 4), as well as by other evidence.

not that of the Hudman oil, that was in issue and the evidence that the Wilson oil was old was overwhelming (Pet. App. A 42). Petitioners' challenge of this holding (Pet. 24–25), which involves no search-and-seizure issue or other issue of constitutional dimension, presents no question meriting further review.

5. Petitioners contend that the Federal Business Records Act (28 U.S.C. 1732) unconstitutionally denies to the accused in a criminal case the right to confront and cross-examine the person who made the record and has knowledge of what was recorded (Pet. 25–27). The contention has, however, been uniformly rejected by the courts. See, *e.g.*, *United States* v. *Lipscomb*, 435 F. 2d 795, 802–803 (C.A. 5), certiorari denied, 401 U.S. 980; *Hanley* v. *United States*, 416 F. 2d 1160, 1166–1168 (C.A. 5), certiorari denied, 397 U.S. 910; *United States* v. *Holmes*, 387 F. 2d 781, 784 (C.A. 7), certiorari denied, 391 U.S. 936; *Kay* v. *United States*, 255 F. 2d 476, 480 (C.A. 4), certiorari denied, 358 U.S. 825; cf. *Palmer* v. *Hoffman*, 318 U.S. 109, 111–115; *Dutton* v. *Evans*, 400 U.S. 74, 96 (Harlan, J., concurring in result).

6. Petitioners contend that the evidence is insufficient to support the verdicts because, while the government proved that the wells on the lease were incapable of producing the oil Pan American was being charged for, it failed to prove that oil in the amounts reflected by the run tickets was not delivered to the buyer from another source (Pet. 27–32). There is no merit to the claim. As previously noted, the government proved that little or no oil had flowed through

the Stentz valve, the conduit from the tanks to the pipeline gathering system, for more than a year prior to the last reported run. The substance of petitioners' present suggestion is that oil in the amounts shown on the run tickets might conceivably have been hauled or piped to the lease from sources other than the wells and delivered into the gathering system at a point below the Stentz valve (Pet. 28). However, Wilson testified that the oil represented by the tickets had all come from the tanks (R. 760). Thus the theory of innocence now suggested is contradicted by Wilson's own testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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